WINSOME AL-YATAMA SDN BHD & ANOR v. PENTADBIR TANAH KOTA TINGGI

HIGH COURT MALAYA, JOHOR BAHRU
MOHD NAZLAN MOHD GHAZALI JC
[JUDICIAL REVIEW NO: 25-18-05-2015]
17 AUGUST 2015

ADMINISTRATIVE LAW: *Remedies – Judicial review – Application for leave – Proceedings against decision of Land Administrator – Failure to make application within three months from date decision communicated – Whether delay justified – Whether good reasons provided for extension of time*

ADMINISTRATIVE LAW: *Remedies – Judicial review – Letter to administrative body requiring response by stipulated date – Whether non-reply per se deemed to be refusal – Whether non-response tantamount to 'decision' amenable to judicial review*

The first applicant was a private limited company established pursuant to a development *cum* joint venture agreement ('DJVA') by the second applicant, a public company limited by guarantee. In accordance with the DJVA, the first applicant developed and managed an oil palm plantation situated on a piece of land ('the land'). The second applicant was the registered proprietor of the said land which was leased to the first applicant. Pursuant to a *gazette* dated 22 May 2014, about 19.354 acres of the land was declared to be the subject of an intended acquisition under s. 8 of the Land Acquisition Act 1960 ('LAA'). The proceedings that followed ultimately resulted in an offer for the award of compensation of RM783,245.65 as stated in the requisite Form H under s. 16 of the LAA. The entirety of the proceedings did not involve the second applicant at all despite its status as the registered owner of the land. The second applicant contended that it was not afforded the right to file Form N under s. 38(1) of the LAA for any objection to the award to be referred to the court for its determination. Subsequently, both applicants wrote separately to the respondent emphasising the status of the second applicant as the registered owner of the land and requested the respondent to refer five specific issues to the court *via* the requisite Form M under s. 36(2) of the LAA. The respondents were required to respond by 9 February 2015. In the absence of a response from the respondent, the applicants filed an application for leave to commence judicial review proceedings primarily for an order of *mandamus* to compel the respondent to refer the questions pursuant to s. 36(2) of the LAA to the court for determination. The issues to be considered by the court were, *inter alia*: (i) the law governing leave application for judicial review made out of time; and (ii) whether a letter to an administrative body requiring a response by a stipulated date could, in the event of a non-response, tantamount to a decision which was reviewable under public law.

Held (dismissing application for leave):

(1) Order 53 r. 3(6) of the Rules of Court 2012 provides that an application for judicial review shall be made promptly and in any event within three months from the date when the grounds for application first arose or when the decision is first communicated to the applicant. The court has the general power to extend or abridge the time limit if there are good reasons to do so. (paras 10 & 13)

(2) The key decision of the respondent on the award as contained in Form H was the primary basis of the applicants' dissatisfaction. Form H was communicated to the first applicant on 18 August 2014. However, the affidavit in support was ambivalent on the exact date the second applicant had notice of Form H. The fact that the applicants being parties involved in the DJVA with the second applicant having equity ownership of the first applicant as well as the registered proprietor of the land, made it difficult for the court to fully appreciate the non-involvement of the second applicant in the proceedings beginning from the *gazette*. Further, the acquisition proceedings initiated by the Land Administrator by giving public notice in Form E clearly identified the second applicant as the registered owner. Nevertheless, the applicants did not offer any evidence or justification for the clear delay and there was also no good reasons provided to justify extension of time to make the leave application for judicial review. (paras 19-21)

(3) It is neither practically desirable nor sufficiently legally robust for letters alleged not to be responded to per se and without more, be deemed to be a refusal to make a decision amenable to the public law remedy of judicial review. A mere non-reply to a letter after a stipulated deadline is too conjectural and contingent in character, status and effect to qualify as a decision or a refusal to make a decision under public law which is susceptible to judicial review. (para 29)

(4) A reference under s. 36(2) is designed to assist the enquiry by the Land Administrator under s. 12 and can only legally take place before an award is made under s. 14 of the LAA. Under s. 36, sequentially Form M should come before Forms G and H concerning awards. In the instant case, the requests by the applicants for the Land Administrator to make a reference in Form M were conveyed in the letters which were dated subsequent to the conclusion of the enquiry and the making of the award. Regardless of whether a reference under s. 36(2) is mandatory or directory, as the Land Administrator had already made an award and given Forms G and H, he was no longer seized of the requisite jurisdiction to consider any reference to the court under s. 36(2). (para 32)

(5) Accordingly, the non-response to requests for reference under s. 36(2) could not give rise to any form of decision or refusal to act which was amenable to judicial review since there is no such lawful authority vested in the Land Administrator in the first place at the relevant juncture that could have been legitimately exercised. (para 32)

Case(s) referred to:

Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor [2008] 6 CLJ 805 CA ***(refd)***

Ahli-ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-Hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals [2012] 1 CLJ 805 FC ***(refd)***

ASMTH Sdn Bhd & Anor v. Pentadbir Tanah Daerah Johor Bahru & Anor [2007] 8 CLJ 445 ***(refd)***

Council of Civil Service Unions v. Minister for Civil Service [1984] 3 All ER 935 ***(refd)***

Mersing Omnibus Co Sdn Bhd v. The Minister of Labour & Manpower & Anor [1983] 2 MLJ 54 ***(refd)***

Pengarah Kastam Negeri Johor & Anor v. Kedai Makan Kebun Teh (Sutera Utama) Sdn Bhd & Ors & Another Appeal [2014] 3 CLJ 733 CA ***(refd)***

Ravindran P Muthukrishnan v. Malaysian Examinations Council [1984] 1 CLJ 232; [1984] 1 CLJ (Rep) 320 FC ***(refd)***

Re Application Of Tan Oon & Ors Tan Oon & 20 Ors v. Pemungut Hasil Tanah, Kuantan [1982] 1 LNS 118 ***(refd)***

Re Bukit Sembawang Rubber Co Ltd v. Sembawang Estates Ltd [1961] 1 LNS 102 ***(refd)***

Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor [2013] 4 CLJ 193 FC ***(refd)***

Wong Koon Seng v. Rahman Hydraulic Tin Bhd & Ors [2003] 5 CLJ 205 HC ***(refd)***

Yahya Kassim v. Kerajaan Malaysia & Anor [1998] 1 CLJ 43 CA ***(refd)***

Legislation referred to:

Land Acquisition Act 1960, ss. 8, 12, 14, 16, 36(2), 38(1)
Local Government Act 1976, s. 94
Rules of the High Court 1980, O. 3 r. 5, O. 53 r. 3(6), (7)
Rules of Court 2012, O. 53 r. 3(2), (6), (7)

For the applicants - Adi Radlan (Kamarudin Yusof with him); M/s Adi Radlan & Co
For the respondent - Thalha Bachok; SFC

Reported by S Barathi

JUDGMENT

Mohd Nazlan Mohd Ghazali JC:

Introduction

[1] This is an application for leave to commence judicial review proceedings primarily for an order of *mandamus* against the decision of the respondent land administrator, Pentadbir Tanah Kota Tinggi relating to its

A administration of an acquisition proceedings under the Land Acquisition Act 1960. A number of preliminary objections were also raised by the learned Senior Federal Counsel ("SFC") for my determination at the hearing on 2 July 2015. I delivered this judgment on 29 July 2015 focusing on the law governing leave application for judicial review made out of time and on the B question whether a letter to an administrative body requiring a response by a stipulated date could in the event of a non-response, tantamount to a decision which is reviewable under public law.

Background

C **[2]** The first applicant, Winsome Al-Yatama Sdn Bhd is a private limited company incorporated on 27 September 2004. It is a joint venture company established pursuant to a development *cum* joint venture agreement dated 28 September 2014 ("DJVA") by the second applicant, Al-Yatama Berhad and Winsome Yields Sdn Bhd with an equity participation of 32% and 68%, respectively. The second applicant is a public company limited by guarantee, D with its principal business being the development and promotion of the economic activities of registered Muslim orphanages in Johor.

[3] In accordance with the DJVA, the first applicant develops and manages an oil palm plantation known as "Winsome Al Yatama Estate" as E well as markets its produce, and is situated on a piece of land in District of Kota Tinggi, measuring approximately 2,702 acres ("the said Land"). The second applicant is the registered proprietor of the said Land. Pursuant to a lease agreement dated 9 November 2004, the second applicant leased the said land to the first applicant for 60 years expiring on 8 November 2064 for its development by the latter in accordance with the DJVA.

F

Compulsory Acquisition

[4] Pursuant to a *gazette* dated 22 May 2014, about 19.354 acres of the said Land was declared to be the subject of an intended acquisition under the s. 8 of the Land Acquisition Act 1960 ("LA Act"). The proceedings that G followed ultimately resulted in an offer for the award of compensation of RM783,245.65 as stated in the requisite Borang H under s. 16 of the LA Act. The crucial contention by the applicants however is that the entirety of the said proceedings for some reasons did not involve the second applicant at all despite its status as the registered owner of the said land. Only the first H applicant, as the registered lessee participated in the proceedings, whose representatives also accepted the award of compensation pursuant to Borang H on 20 August 2014.

[5] The second applicant further contended that as the proceedings only involved the first applicant, the former was not afforded the right to file Form I N under s. 38(1) of the LA Act for any objection to the award be referred to the court for its determination. Only the first applicant managed to file the same on 24 September 2014.

[6] Upon discovery of the matter by the second applicant, and following some internal deliberations, both applicants wrote separate letters to the respondent on 13 January 2015, emphasising the status of the second applicant as the registered owner of the said land, and most relevant to this judicial review application, requesting the latter to refer five specific issues to the court *via* the requisite Form M under s. 36(2) of the LA Act. Crucially, the applicants also requested that the respondent must reply by 9 February 2015. Up to the day of the hearing of the leave application on 2 July 2015, no response from the respondent had been forthcoming.

The Issues Requested To Be Referred Under s. 36

[7] The five questions put forward by the applicants to the respondent for reference to the court (as extracted from the submission of the applicants) are as follows:

(a) Pentafsiran sebenar atau keesahan atau efek atau the true construction or validity or effect of development and joint venture agreement di antara pemohon kedua, pemohon pertama dan Winsome Yields bertarikh 28 September 2004, dibaca bersama dengan lease agreement bertarikh 9 November 2004, yang mana salinan-salinannya adalah sepertimana termaktub di dalam eks. "I" di atas.

(b) Pihak yang berhak kepada hak atau kepentingan dalam atau person entitled to a right or interest in pengambilan tanah dan/atau pembinaan saluran paip air sepanjang sempadan barat daya atau southwestern boundary tanah berjadual tersebut, sepertimana ditandakan merah pada pelan yang disertakan bersama-sama di dalam eks. "I" di atas.

(c) Setakat mana atau bentuk hak atau kepentingan tersebut atau the extent or nature of such right or interest.

(d) Pembahagian pampasan untuk hak atau kepentingan tersebut atau the apportionment of compensation for such right or interest.

(e) Pihak-pihak yang berhak kepada pampasan yang berbayar atau the persons to whom such compensation is payable.

[8] The applicants are thus seeking an order of *certiorari* to quash the decision of the respondent in refusing the applicants' request, as well as an order of *mandamus* to compel the respondent to refer the said questions pursuant to s. 36(2) of the LA Act to court for its determination.

Preliminary Objections

[9] The learned Senior Federal Counsel ("SFC") who appeared at the hearing objected to the leave application and raised three grounds for the same in her oral submissions. These were on the contention on the authority of the deponent of the supporting affidavits for the applicants, on the

application being pre-mature and that it being out of time in any event. I will, as I should, deal with the last point of objection on whether the application is filed out of time first.

Was The Judicial Review Leave Application Filed Out Of Time

[10] It is imperative that this question be dealt with first because O. 53 r. 3(6) provides that an application shall be made promptly and in any event within three months from the date when the grounds of application first arose or when the decision is first communicated to the applicant. Case law authorities have established that when an *ex parte* leave application was not filed within the stipulated time, the judgment would be irregular (see *Wong Koon Seng v. Rahman Hydraulic Tin Bhd & Ors* [2003] 5 CLJ 205; [2003] 1 MLJ 98). In *Yahya Kassim v. Kerajaan Malaysia & Anor* [1998] 1 CLJ 43; [1997] 3 MLJ 749, the Court of Appeal held that failure to apply within time is usually fatal.

[11] More fundamentally, the court has no jurisdiction to grant leave where the applicant is out of time or cannot account for the delay to the satisfaction of the court under O. 3 r. 5. In *Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor* [2008] 6 CLJ 805; [2008] 6 MLJ 704 ("*Abdul Rahman bin Abdullah Munir*"), the Court of Appeal, in dismissing the appeal against the decision of the High Court refusing the judicial review application, held that the jurisdiction of the High Court to entertain an application for judicial review "may only be exercised upon obligatory compliance with the imperative requirement of time set under O. 53 r. 3 of the RHC." In that case, the appellants had not applied for an extension of time nor was any explanation given for the delay.

[12] The decision of the Federal Court in *Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor* [2013] 4 CLJ 193 ("*Wong Kin Hoong*") reaffirms this position, holding that the Federal Court decision in *Mersing Omnibus Co Sdn Bhd v. The Minister of Labour & Manpower & Anor* [1983] 2 MLJ 54 and *Ravindran P Muthukrishnan v. Malaysian Examinations Council* [1984] 1 CLJ 232; [1984] 1 CLJ (Rep) 320; [1984] 1 MLJ 168 which had precluded an examination of the merits of the case in considering an application for extension of time for leave to file an application for judicial review is still good law even though they were decided prior to the amendment to O. 53 r. 3(6) of the RHC in 2000, and subsequently adopted in the Rules of Court 2012. Further, Raus Sharif PCA, delivering the judgment of the Federal Court reiterates the rule succinctly in the following terms:

> ... the time frame in applying for judicial review prescribed by the Rules is fundamental. It goes to jurisdiction and once the trial judge had rejected the explanation for the delay for extension of time to apply for

judicial review, it follows that the Court no longer has the jurisdiction to hear the application for leave for judicial review. Whether the application has merits or not, is irrelevant.

[13] The Federal Court in *Wong Kin Hoong* also reaffirms the principle that under O. 53 r. 3(6) and (7) whether an extension of time ought to be granted or otherwise is an exercise of judicial discretion which would rarely attract appellate intervention absent the exercise of the discretion on a wrong principle. Thus, the court has the general power to extend or abridge the time limit under O. 53 r. 3(6) and (7) if there are good reasons to do so.

[14] I shall now consider whether there is a delay and whether there are good reasons for me to extend time. In prayer 2 of their application for judicial review filed on 5 May 2015 (encl. 1), the applicants asked for the time period to file the proceedings be extended or enlarged pursuant to O. 53 r. 3(6), (7) and (8) of the Rules of Court 2012. There is no mention of any issue of extension of time in the requisite statement under O. 53 r. 3(2). Nor is there reference to any delay in the affidavit in support of the applicants affirmed by Dato Hj Mohd Salleh bin Hj Tahir, a common director of both applicants, other than a somewhat oblique statement that the second applicant had taken some time to finally decide on the appointment of lawyers and to institute legal proceedings given its status as an entity overseeing charitable orphanage organisations in Johor, which required an in depth, detailed and comprehensive assessment by the directors on the use of funds belonging to the orphanages.

[15] Based on the materials before the court, it is not specifically stated why prayer 2 in encl. 1 is necessary. However, from the facts it could be surmised that the decision sought to be impugned is primarily that on the award of compensation accepted by the first applicant on 20 August 2014 by way of "terima dengan bantahan" which offer was issued under Borang H two days prior, on 18 August 2014. Indeed prayer 1(a) of encl. 1 refers to an order of *mandamus* to compel the respondent to refer the five questions to the court under s. 36(2) of the LA Act and to thereafter decide on the compensation payable to the applicants. Prayer 1(b) on *certiorari* crucially makes reference to two 'decisions' to be quashed, namely the respondent's refusal to refer the questions by 9 February 2015 as requested by the applicants earlier (1(b) (i)) and the award by the respondent on 18 August 2014 itself (1(b)(ii)).

[16] Therefore, based on encl. 1, there are evidently two "decisions" which the applicants seek to challenge. The learned SFC objected on the basis that an application for leave was both pre-mature as well as out of time. Counsel for the applicants countered that the application could be one but not be both pre-mature and out of time as these are contradiction in terms. I understand

the contention of the learned SFC to mean that in respect of the award which was given on 18 August 2014, this leave application, having been filed only on 5 May 2015 is therefore non-compliant by more than four months after the expiry of the three months specified under O. 53 r. 3(6). It is also pre-mature because the first applicant has filed Borang N, requesting the amount of compensation be referred to the land reference court for determination under s. 38(1) of the LA Act which was still pending and that in any event, the respondent has not replied to the letters from the applicants. At the hearing however, counsel for the applicants indicated that the main thrust of the judicial review application was to obtain a *mandamus* to compel the reference of the five questions arising from the respondent's failure to do so by 5 February 2015. This is subsequently confirmed by counsel for the applicants in their further submission filed on 22 July 2015. For completeness, I will deal with both "decisions", namely the award by the respondent and the respondent's refusal to respond.

Decision On The Award By Land Administrator

[17] In my assessment, it is plain that the key decision of the respondent on the award as contained in Borang H is the primary basis of dissatisfaction on the part of the applicants, for the reason not only on the said inadequacy of the amount of compensation, but also that it did not include compensation to the second applicant as the registered owner of the said Land. At the outset it should be made clear that decisions of land administrators on awards given under s. 14 of the LA Act can be subject to judicial review (see *Re Application Of Tan Oon & Ors Tan Oon & 20 Ors v. Pemungut Hasil Tanah, Kuantan* [1982] 1 LNS 118; [1985] 2 MLJ 67).

[18] In a recent decision of the Court of Appeal in *Pengarah Kastam Negeri Johor & Anor v. Kedai Makan Kebun Teh (Sutera Utama) Sdn Bhd & Ors & Another Appeal* [2014] 3 CLJ 733, a case referred to by the learned SFC in her oral submission, a delay by a mere three days was ruled to be fatal to the leave application. The Court of Appeal held that the law is clear that delay *per se* may be innocuous but its occurrence, whatever its period, must be explained by the applicant. In that case no explanation had been offered as to why there had been a delay. It was further held, in allowing the appeal, that the trial court was therefore not properly clothed with the threshold jurisdiction to entertain the leave application in the first place. The application was considered as an abuse of the process of the court and ought to have been dismissed.

[19] In the instant case, Borang H was communicated to the first applicant on 18 August 2014. The affidavit in support was however ambivalent on the exact date that the second applicant had notice of Borang H. But in my view the fact that the first and second applicants are parties involved in the joint

venture development of the said land with the latter having equity ownership of the former, other than the fact of the second applicant being the registered proprietor of the said land make the non-involvement of the second applicant in the proceedings beginning from the *gazette* difficult to fully appreciate. The acquisition proceedings were initiated by the land administrator by the giving of public notice in form E. Exhibit B of the affidavit of the common director of the applicants is the requisite Form E which clearly identifies the second applicant as the registered owner. If only the first applicant was notified and involved from the beginning, such as by their receipt of Borang F why could they not have informed the second applicant about the proceedings (assuming this was not done). The second applicant could have been informed by the first applicant to respond to the public notice in Borang E from the respondent, inviting those who had an interest in the said land to an inquiry which was then held on 18 August 2014, attended by the representatives of the first applicant only.

[20] Even the affidavit in support is affirmed by a common director of both applicants. Equally unconvincing is the general and bare averment that the second applicant needed time to deliberate on the matter before deciding to institute proceedings, if this is intended to be the explanation for the delay in the first place. The second applicant did not offer any evidence to substantiate this nor submit any other materials or justifications for the clear delay to persuade this court to exercise its discretion in favour of the applicants.

[21] I do not therefore find this explanation to be satisfactory or reasonable in clarifying the circumstances on the delay in filing the requisite application by more than four months after the expiry of the three months period following the granting of the award under the LA Act. Accordingly, I hold that no good reason exists to justify extension of the time to make the leave application for judicial review.

"Decision" On Letter Not Replied To

[22] I now examine the second "decision" which according to counsel for the applicants is the focus of their judicial review application. In essence, the argument is that the *mandamus* prayed for is to compel the respondent to refer the five questions to the court under s. 36(2) of the LA Act. The decision sought to be impugned is therefore the purported decision of the respondent in refusing to make the said reference to court by the deadline requested by the applicants on 9 February 2015 being the date the respondent is deemed by the applicants to have made the decision to refuse their requests. Thus, no issue of the application being made out of time would arise since the application was filed on 5 May 2015, four days before the expiry of the three month time period under O. 53 r. 3(6).

[23] The question is whether the non-response by the respondent to the letter of the applicants dated 13 January 2015 by the deadline specified by them on 9 February 2015 can be considered as a form of decision, the act or omission in respect of which can legally attract the public law remedies of judicial review. It is trite law as emphasised by the Federal Court in *Ahli-ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-Hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals* [2012] 1 CLJ 805, following *Council of Civil Service Unions v. Minister for Civil Service* [1984] 3 All ER 935 that for a decision to be susceptible to judicial review, there must first be a decision by a decision maker or a refusal by him to make a decision, and that decision must affect the aggrieved party.

[24] The parties before me at the hearing did not specifically submit on this point. Following my review of the law on the matter, I shall refer first to the case of *Re Bukit Sembawang Rubber Co Ltd v. Sembawang Estates Ltd* [1961] 1 LNS 102; [1961] MLJ 269 ("*Sembawang Rubber*"). In this case, an order of *mandamus* was issued against the Collector of Land Revenue who failed to make an award after the enquiry under s. 10 of the Land Acquisition Ordinance, initially for about three months and then after citing a government freeze on budget for development projects, for another three and a half years until the applicant wrote to the collector. The High Court stated that as a general rule, *mandamus* will not be granted unless it is shown by evidence that there was a distinct demand which the party seeking the *mandamus* desires to enforce and that that demand was met by a refusal. The following part of the judgment on this point is of relevance to the instant case:

> According to the cases that have been cited, a refusal may be an absolute refusal in terms or there may be conduct amounting to a refusal. Where the respondent has not refused compliance in express terms it is a question of fact whether his conduct evinces a clear determination not to comply.
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> In *R v. The Brecknock and Abergavenny Canal Company* 111 ER 395, Lord Denham CJ says (at p. 397):
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> > We cannot grant a *mandamus* unless there has been a direct refusal; and here, I think, there has not. It is not indeed necessary that the word "refuse", or any equivalent to it, should be used; but there should be enough to shew that the party withholds compliance, and distinctly determines not to do what is required.
>
> Delay in complying with the demand may well amount to refusal. In *R v. Central Professional Committee for Opticians* [1949] 2 All ER 519, *mandamus* was refused on the ground that the Committee had not been guilty of such delay as to amount to refusal to consider and determine the application made to them.

> The absence of a reply to the letters of the Applicants dated the 5th and 14th April, 1961, coupled with the fact that in the letter of the Commissioner of Lands of the 9th February, 1961 (which was signed by Mr. Un, the Collector, for the Commissioner) it was stated that the withdrawal or otherwise of the acquisition was under active consideration and not that the award was under active consideration and coupled with the fact that 3 1/2 years have elapsed since the enquiry under section 10 was held, is in my view a clear indication of refusal. I am satisfied that the Collector has been guilty of such delay as to amount to a refusal to make an award.

[25] There must therefore be clear evidence of a refusal to act. In *Sembawang Rubber* this was established primarily on the basis of the inordinately long delay in making the award (which the collector was duty bound to make under the ordinance) despite the land enquiry having been conducted long before. In the instant case, the award has already been granted following conclusion of the enquiry. More directly, the case of *Abdul Rahman bin Abdullah Munir* is instructive for the similarity in the focus of the form of decision intended to be impugned. In this case, the appellants sought to challenge an administrative decision taken by the first respondent, Datuk Bandar Kuala Lumpur in connection with a proposed burial ground neighbouring the appellants' condominium. The first respondent contended that a decision pursuant to s. 94 of the Local Government Act 1976 had been taken at a meeting held on 10 June 2003 in respect of the alienation of a buffer land as an extension of the existing burial ground. Despite steps having been taken by the first respondent and other authorities towards the implementation of the said decision, the appellants on 22 December 2004 wrote to the first respondent seeking confirmation that the first respondent would not use the buffer land as a burial ground. Of relevance is the fact that in that letter, the first respondent was given a one week time frame to reply, and if not, the first respondent would be deemed to have made a contrary decision. Like in the instant case, the first respondent did not respond to the letter. The appellants, like the applicants in the instant application, took the position that the actual decision was made on 5 January 2005 (being one week after the first respondent received the letter on 27 December 2004). Thus, although they filed the application for judicial review on 14 February 2005, they appeared to have been well within the three-month time period under O. 53 r. 3(6).

[26] The Court of Appeal rejected this argument. Based on evidence it was found that the appellants knew of the decision on 10 June 2003 when it was communicated to their representatives on 8 November 2003, the date the Court of Appeal held to be the date the decision was communicated to the appellants, which was more than one year before the appellants filed the application for judicial review on 14 February 2005. The inordinate delay therefore breached O. 53 r. 3(6). Abdull Hamid Embong JCA (as His Lordship then was) also made the following findings in respect of the letter:

A To say that the decision was only made on 5 January 2005 after the first respondent had failed to revert to their letter of 22 December 2004, is fallacious. We also find it ludicrous for the appellants to hold the view that a decision was only arrived at when the first respondent failed to respond to the one-week time period ultimatum in their letter. The latter was not duty-bound to respond to what we feel, corresponded to a threat.

B Thus, our view is that no decision was made by the first respondent pursuant to that latter. No decision need in fact be made as it was already made earlier.

C An application for a judicial review under O 53 of the RHC is intended to impugn a decision. This is central to any judicial review. The appellants contended that there was a "deemed decision" by the first respondent made on 5 January 2005 when it failed to revert to the appellants' letter of 22 December 2004.

D It is thus crucial to first identify definitely what the decision is that is sought to be impugned. This has to be the actual date (see *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1). The appellants' interpretation towards the first respondent's non-response to their letter makes no sense and far stretching one's imagination. This would give rise to an artificial meaning to the word decision. The date of the decision too becomes fictitious which makes the computation of the statutory time limit under

E O. 53 of the RHC indeterminable.

[27] The Court of Appeal therefore did not accept that a decision can be deemed in a situation where the administrative body does not respond to a letter after a stipulated deadline, as that would give artificiality to the concept

F of a decision and a fiction to the date of the purported decision, resulting in the computation of time limit lacking in certainty.

[28] The applicants did contend, in their further submissions that in the case of *ASMTH Sdn Bhd & Anor v. Pentadbir Tanah Daerah Johor Bahru & Anor* [2007] 8 CLJ 445, the land administrator similarly ignored a written request

G to refer certain questions of law under s. 36(2) of the LA Act to the High Court but proceeded to hold the land enquiry. The High Court granted an order of *certiorari* to quash the refusal of the land administrator to make the said reference. The applicants in the instant case therefore argued that a decision does not have to be made in writing nor even be expressly made. However, a careful review of the *ASMTH* case shows that there must have

H been a definitive act which evidenced the refusal since it is stated in the judgment that "At the resumed enquiry, the Land Administrator rejected the application to refer to the High Court the two questions the applicants had framed".

I **[29]** As I have alluded to in the case of *Sembawang Rubber*, where the public body has not refused compliance in express terms it is a question of fact whether his conduct evinces a clear determination not to comply. This in my

view is clearly demonstrated to be the case on the facts in *ASMTH* by virtue of the land administrator proceeding with the land enquiry, but not in the instant case. It is in my judgment neither practically desirable nor sufficiently legally robust for letters alleged not to be responded to *per se* and without more, be deemed to be a refusal to make a decision amenable to the public law remedy of judicial review. For example there could be issues as to whether the letter is actually received, and if so the date of receipt. Further, the authority may possibly actually act on the request but choose not to revert to the applicant. And what principle should govern the time-frame imposed on the administrative body by the applicant? Thus, a mere non-reply to a letter after a stipulated deadline is too conjectural and contingent in character, status and effect to qualify as a decision or a refusal to make a decision under public law which is susceptible to judicial review.

No Jurisdiction To Make Reference Under S. 36 (2) After Award

[30] There is however one other fundamental reason why the non-responsive stance taken by the land administrator in the instant case cannot under the law be construed as a form of a decision or refusal to make a decision. In the case of *ASMTH*, as mentioned earlier the request for reference of certain questions to the High Court under s. 36(2) of the LA Act was rejected by the land administrator. Section 36 reads as follows:

> 36. Reference to Court.
>
> (1) No reference to Court under this Act shall be made otherwise than by the Land Administrator.
>
> (2) The Land Administrator may, at any time of his own motion by application in Form M refer to the Court for its determination any question as to:
>
> (a) the true construction or validity or effect of any instrument;
>
> (b) the person entitled to a right or interest in land;
>
> (c) the extent or nature of such right or interest;
>
> (d) the apportionment of compensation for such right or interest;
>
> (e) the persons to whom such compensation is payable;
>
> (f) the costs of any enquiry under this Act and the persons by whom such costs shall be borne.
>
> (3) Without prejudice to the powers of the Court under this Part, the costs of any reference under subsection (2) shall be borne by such person as the Court may direct or, in the absence of such direction, by the Land Administrator.
>
> (4) After an award has been made under section 14 the Land Administrator shall refer to the Court for determination any objection to such award duly made in accordance with this Part.

[31] In allowing the grant of *certiorari* to quash the said rejection, the court also held that the word "may" should be interpreted as being imperative and the land administrator must refer a question of interpretation that arose in the course of an enquiry to the court for determination. But, a more pertinent point that ought to be highlighted is the context of the application of s. 36(2) as explained by the High Court in *ASMTH* as follows:

> (2a) A reference to the High Court under s. 36(2) of the Act precedes an award since the questions that may be referred under the section would have a bearing on the size of the award or the person(s) to whom the compensation is payable, and if more than one, a manner in which the compensation is to be apportioned between those persons. Naturally, such issues may arise during the course of an enquiry. Once referred to the High Court and duly determined, the land administrator would proceed with the enquiry and deal with those issues in accordance with the determination of the High Court. Section 37 of the Act, on the contrary, deals with a situation where the land administrator has made an award and an objection is taken on any one or more of the specified grounds. The legislature envisaged that the recourse to the court under section 36(2) would be invoked before an award is made and the enquiry complete since a determination by the court under section 36(2) would have a direct bearing on the ultimate result of the enquiry. Since sections 36(2) and 37 of the Act are designed to cater to distinct circumstances, this application was not bad for duplicity. (paras 22 & 23)

[32] It is therefore plain that a reference under s. 36(2) is designed to assist the enquiry by the land administrator under s. 12 and can legally only take place before an award is made under s. 14 of the LA Act. In the case of *ASMTH*, the request for reference was made before enquiry commenced. This also means that sequentially Form M under s. 36 should come before Forms G and H concerning awards. In the instant case, the requests by the applicants for the land administrator to make a reference in Form M were conveyed in the letters which are dated subsequent to the conclusion of the enquiry and the making of the award. Regardless of whether a reference under s. 36(2) is mandatory or directory, as the land administrator in the instant case has already made an award and given Forms G and H, he is no longer seized of the requisite jurisdiction to consider any reference to the court under s. 36(2). Therefore it cannot even be said that the land administrator in this case had refused to make the reference in the sense of deciding to exercise his discretion not to do so, since he was from the point of granting of the award on 18 August 2014, and well before the requests by the applicants for the reference, already divested of any such discretion under s. 36(2). Accordingly, in my view, in the instant case, the non-response to requests for reference under s. 36(2) additionally cannot give rise to any form of decision or refusal to act which is amenable to judicial review since there is no such lawful authority vested in the land administrator in the first place at the relevant juncture that could have been legitimately exercised.

Conclusion

[33] In conclusion, in view of the foregoing reasons, as the leave application for judicial review concerning the award under the LA Act was made out of time and there is no satisfactory explanation for the delay, and having regard to the abundance of clear and binding precedents, this court is therefore not vested with the threshold jurisdiction to consider the judicial review application, regardless of the merits of the same. In addition, the letter from the applicants not responded to by the land administrator cannot tantamount to a decision capable of being judicially reviewed. Accordingly, I dismissed this leave application. Since this preliminary objection on the application being out of time alone can dispose of this application, it is not necessary for me to deal with the other two objections raised by the learned SFC.